In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6196

JAIME AVILES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction must be vacated because the district court failed to advise him of the mandatory special parole term provisions prior to accepting his plea of guilty.

On February 15, 1973, petitioner pleaded guilty in the United States District Court for the Southern District of New York to an indictment charging petitioner and a co-defendant with distribution of heroin, in violation of 21 U.S.C. 841(a)(1), and to an information charging petitioner as a second offender, pursuant to 21 U.S.C. 841(b)(1)(A) (Pet. App. C, pp. 23a, 26a). Before accepting the plea, the district court conducted an inquiry into its voluntariness, as required by Rule 11, Fed. R. Crim. P. Petitioner submitted a written waiver of constitutional rights, in which both he and his attorney represented that petitioner had been advised of the punishment that could be

imposed (Pet. App. A, pp. 2a-3a, nn. 1 and 2). At the proceeding, the prosecutor stated, and petitioner's counsel agreed, that the maximum sentence could be twenty-five years' imprisonment (Pet. App. C, p. 24a).[1]

The district judge accepted the guilty plea after satisfying himself that petitioner was entering it voluntarily and intelligently (Pet. App. A, pp. 24a-27a). Petitioner was subsequently sentenced to twelve years' imprisonment, to be followed by a six-year special parole term (Pet. App. D, p. 40a).

Over two years later, in June 1975, petitioner moved to vacate his conviction pursuant to 28 U.S.C. 2255 on the ground that he was not advised of the mandatory special parole term by the court at the time of his plea, in violation of Rule 11, Fed. R. Crim. P.[2] Petitioner did not claim that he was actually unaware of the mandatory special parole term at the time he pleaded, nor did he allege that the court's failure itself to advise him of that consequence of his plea had any bearing whatsoever upon his decision to plead guilty (that it did not is amply confirmed by the fact that petitioner made no effort to withdraw his plea for more than two years after the sentence including special parole was imposed). Instead, he simply claimed that two decisions of the court of appeals (*Michel* v. *United States*, 507 F.2d 461 (C.A. 2), and *Ferguson* v. *United States*, 513 F.2d 1011 (C.A. 2)) gave him the absolute right to have his conviction set aside even though the Rule 11 "defect" was wholly immaterial to either the knowing or the voluntary character of his plea (see Pet. App. A. p. 5a).

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[1]As the district court noted (Pet. App. A, p. 3a, n. 3), the correct maximum penalty is thirty years' imprisonment to be followed by a minimum term of six years' special parole.

[2]This is petitioner's second Section 2255 motion. In November 1974, petitioner moved to vacate on the grounds that the sentence violated a pre-pleading agreement with a government informant and that it was based in part on an inaccurate presentence report. The motion was denied, and petitioner did not appeal.

The district court denied relief (Pet. App. A), holding that collateral relief is not available to correct an error of the kind alleged by petitioner (Pet. App. A, pp. 12a-13a, 15a). The court also found the error to be harmless, because petitioner did not allege that he had been prejudiced and because the period of federal supervision under the sentence given was shorter than the possible sentence of which he was advised (Pet. App. A, p. 16a). The court of appeals affirmed summarily (Pet. App. B).

Petitioner's contention that his sentence must be vacated under the circumstances of this case is precisely the same claim as was advanced by the petitioner in *Bell* v. *United States,* No. 75-5722, certiorari denied, February 23, 1976. We rely here upon the arguments presented in our memorandum in opposition to certiorari in *Bell.*[3] As we there argued, and as the district court held in this case, the defect alleged by petitioner may not be raised in a Section 2255 proceeding, since petitioner has not claimed that his plea was entered involuntarily, that he would have refused to plead guilty had he been informed of the mandatory special parole term by the district court, or that holding him to his plea would be a miscarriage of justice. Indeed, on the facts of this case, any such claims would be highly suspect in light of the observations of the district court, which found (Pet. App. A, p. 17a):

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[3]We are furnishing counsel for petitioner with a copy of our memorandum in *Bell.* While the decision here, like that in *Bell,* appears inconsistent with results reached in other circuits (see *United States* v. *Yazbeck,* 524 F.2d 641 (C.A. 1); *Ferguson* v. *United States,* 513 F.2d 1011 (C.A. 2); *United States* v. *Wolak,* 510 F.2d 164 (C.A. 6); *Roberts* v. *United States,* 491 F.2d 1236 (C.A. 3); *United States* v. *Richardson,* 483 F.2d 516 (C.A. 8)), those conflicting results reflect no consideration of the limitations that exist upon the availability of collateral relief, and we continue to believe that any conflict will dissipate when the courts give attention to that factor.

> [Petitioner] was well aware that as a second offender he was exposed to an extended prison term since the court stressed this to him before accepting his plea * * *, yet the total term of supervision to which he was sentenced was far shorter than that of which he was advised. Aviles' unsuccessful §2255 petition on other grounds and the two years and three months between Aviles' sentencing and filing of this petition stand as some evidence of the fact that neither he nor his counsel was surprised by the imposition of a special parole term or initially thought of the absence of any special parole reference as a possible infirmity to his sentence.

Additionally, petitioner's counsel noted at a conference on the present motion that prior to pleading, petitioner was concerned only with the possible term of imprisonment (Pet. App. E, p. 43a).

In this light, petitioner's claim of technical noncompliance with Rule 11, Fed. R. Crim. P., does not raise " 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *." *Davis* v. *United States,* 417 U.S. 333, 346, quoting *Hill* v. *United States,* 368 U.S. 424, 428. Accordingly, petitioner's contention is not cognizable as a ground for collateral relief. See *Bachner* v. *United States,* 517 F.2d 589 (C.A. 7).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[4]For the first time, petitioner here claims that the Rule 11 defect constitutes a violation of due process (Pet. 8). Absent a claim that his plea was involuntary or that the procedures here were fundamentally unfair, petitioner's broad constitutional claim is groundless. See *Bachner* v. *United States, supra,* 517 F.2d at 598-599 (Stevens, J., concurring).